

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
COMMNET SUPPLY, LLC, CROSSROADS)	Call Sign WQGH652
LICENSE HOLDING SUB A, and their successors)	ULS File Nos. 0003818184
in interest)	0003805569
)	
Request for Waiver and Extension of PCS)	
Construction Requirements)	
)	
Request for Renewal of PCS License)	

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 2019

Released: November 27, 2019

By the Commission:

I. INTRODUCTION

1. In 2007, Crossroads Wireless, Inc. acquired a 10-megahertz PCS license through a secondary market transaction. That license required the company to operate with a signal level sufficient to provide “adequate service” to at least two-thirds of the population in its license area by June 30, 2009. Crossroads Wireless engaged in a series of transactions involving the license that resulted in the transfer of the license to Commnet Supply, LLC (Commnet) and ultimately the conditional transfer to NTCH, Inc., in April 2010, following Crossroads Wireless’s bankruptcy in 2009. In the meantime, Commnet sought to retain control of the license not by meeting the construction requirement but instead seeking a waiver of that requirement in April 2009, just two months before the deadline.

2. The Mobility Division of the Wireless Telecommunications Bureau denied the waiver request in 2012, as well as a petition for reconsideration of that denial in 2018. Before us now is an application for review from Petitioners Crossroads Wireless Liquidating Trustee¹ and NTCH, Inc. challenging the Division’s findings. The record shows that the failure to meet the Commission’s service requirements was not caused by unique circumstances or factors beyond the licensee’s control, but rather by its own lack of diligence. We therefore affirm the Division’s conclusion that Petitioners failed to justify their requested relief.

II. BACKGROUND

3. The rules for the PCS license at issue require a licensee to serve “with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of

¹ Crossroads Wireless Liquidating Trustee (Crossroads Trustee) was established pursuant to Crossroad Wireless’s Chapter 11 bankruptcy proceeding for the purpose of liquidating and administering all assets and causes of action associated with the Crossroads Wireless estate. *See infra* para. 9.

being licensed. . . . Failure by any licensee to meet these requirements will result in forfeiture or non-renewal of the license and the licensee will be ineligible to regain it.”²

4. In April 2007, Crossroads Wireless acquired a 10- megahertz PCS license in a secondary market transaction at a time when it was clear under our rules that Crossroads Wireless would have only two years to complete the final construction obligation.³ In August 2008, Crossroads Wireless assigned the license to a newly formed, wholly owned subsidiary, Crossroads License Holding Sub A (Crossroads Sub).⁴ Crossroads Wireless simultaneously pledged all of the equity in Crossroads Sub as collateral for debts owed to Commnet.⁵ On November 19, 2008, Crossroads Wireless transferred control of Crossroads Sub to Commnet in partial satisfaction of that debt.⁶

5. On February 13, 2009, several of Crossroads Wireless’s creditors filed an involuntary petition under Chapter 7 of the Bankruptcy Code to force the operating subsidiary—Crossroads Wireless Holding—into bankruptcy.⁷ Subsequently, on February 20, 2009, Crossroads Wireless filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code, and its operating subsidiary converted its Chapter 7 case to a Chapter 11 case.⁸ Upon the filing of the bankruptcy, Crossroads Wireless began operating as a debtor-in-possession (Crossroads DIP).⁹ Commnet retained control of Crossroads Sub’s stock during the bankruptcy proceeding of Crossroads DIP.¹⁰

6. The record shows that, as of November 2008, when Crossroads Sub was transferred to Commnet, Crossroads Wireless was operating a single cell site in the license area, providing roam-only

² See 47 CFR § 24.203(a). Licensees may, in the alternative, provide substantial service within the appropriate five- and ten-year benchmarks. *Id.* The “substantial service” rule, however, was not in effect at the time of the five-year construction deadline in this case. See *Commnet Supply, LLC, Crossroads License Holding Sub A, and their successors in interest, Request for Waiver and Extension of PCS Construction Requirements, Request for Renewal of PCS License*, Order, 33 FCC Rcd 8026, 8034-35, paras. 27-29 (WTB-MD 2018) (*Reconsideration Denial*).

³ See ULS File No. 0002938946. Crossroads Wireless also held other licenses not at issue in this waiver proceeding. The license at issue was created on October 21, 2006, by a disaggregation of 10 megahertz of spectrum from a license held by Chariton Valley Communications Corp. (Chariton), Call Sign WPOJ715, to Chickasaw Wireless, Inc. See ULS File No. 0002779737. The license was then assigned to Crossroads Wireless less than one year later.

⁴ See Crossroads Wireless Inc. Notification of Pro Forma Assignment, ULS File No. 0003535532 (filed Aug. 6, 2008); Crossroads License Holding Sub A Inc., Form 601, Request for Waiver of Cellular Discontinuance of Service, ULS File No. 0003818184, at 1 (filed Apr. 24, 2009) (Original Waiver Request).

⁵ Original Waiver Request at 1-2.

⁶ *Id.* at 2. The Commission granted the application on November 19, 2008, and the transaction was consummated on that date. ULS File Nos. 0003655458, 0003652711.

⁷ See Crossroads Wireless, Inc., and Crossroads Wireless Holding, LLC, *Disclosure Statement With Respect to Joint Plan of Liquidation By the Debtors and the Official Committee of Unsecured Creditors on Behalf of Crossroads Wireless, Inc. And Crossroads Wireless Holding, LLC*, Case No. 09-10596-WV, at 5 (Bank. W.D. Okla. 2009) (*Court Disclosure of Liquidation*). Crossroads Wireless Holding operated indistinguishably from Crossroads Wireless. See *id.* at 4.

⁸ Crossroads Wireless, Inc., Form 601, Third Supplement to Request for Waiver/Extension of Time at 1-2 (filed May 5, 2010) (Third Supplement). Ultimately, the U.S. Bankruptcy Court authorized the estate to sell substantially all of Crossroads Wireless’s assets, including its wireless licenses, to satisfy its debts. Crossroads Wireless, Inc., and Crossroads Wireless Holding, LLC, *Order Confirming Plan*, BK-09-10596-TMW, Doc. 1037 (Bank. W.D. Okla. 2010) (*Court Order Confirming Plan*).

⁹ 11 U.S.C. § 1107 (describing the rights, powers, and duties of a debtor-in-possession).

¹⁰ See *Court Disclosure of Liquidation*, Case No. 09-10596-WV, at 13-14 (discussing Commnet receiving a judgment in Chancery Court for certain Licenses and equipment in partial satisfaction of a debt, noting that the debtors and Committee did not believe those assets to be properly perfected, and reaching general settlement in November 2009).

service with no local subscribers.¹¹ That service was discontinued on April 18, 2009, however, after Commnet received notice from the company operating the cell site that Crossroads Wireless had “defaulted on its agreement.”¹²

7. On April 24, 2009, just two months before the construction deadline, Crossroads Sub, on behalf of itself and Commnet, filed a construction waiver request with the Commission.¹³ That filing included a declaration from Commnet’s attorney, executed on April 16, 2009, stating that Crossroads DIP’s bankruptcy counsel had orally advised Commnet’s attorney that it might pursue an avoidance action to recover the stock of the licensee from Commnet.¹⁴ Crossroads DIP never in fact filed such an avoidance action. Nonetheless, in the waiver request, Crossroads Sub asked for an extension of the construction deadline until six months after the bankruptcy court entered an order resolving any such avoidance action.¹⁵ Crossroads Sub argued that the threatened avoidance action placed “a substantial cloud” over the ownership of the license and that it would be unreasonable to require either Commnet or Crossroads Sub to complete construction by the June 30, 2009 deadline.¹⁶

8. On May 18, 2009, Crossroads Sub amended the original waiver request, asking to extend the construction deadline to January 23, 2010. It asserted that Commnet reserved the option to request a further extension if the alleged disputed ownership of the license was not resolved by July 23, 2009.¹⁷ On July 8, 2009, Crossroads Sub and Commnet proposed that the Commission adopt a general policy of providing construction deadline relief when ownership is uncertain due to a possible avoidance action.¹⁸

9. In February 2010, the bankruptcy court approved a settlement requiring the assignment of the license from Crossroads Sub and Commnet to Crossroads DIP, and the court approved a plan to allow transfer from Crossroads DIP to a liquidating trust.¹⁹ On March 3, 2010, the Commission conditionally approved the transfer of control of the license from Crossroads DIP to the Crossroads Trustee while the waiver request was pending.²⁰

10. In April 2010, Crossroads Trustee reached an agreement to transfer the license to NTCH, contingent upon the Commission’s approval of the Original Waiver Request.²¹ The Division approved that transfer of control on April 3, 2010.²² On May 5, 2010, Crossroads DIP submitted a third supplement to the original construction deadline waiver request, in which it claimed that if the Commission granted

¹¹ Original Waiver Request at 2, n.1.

¹² *Id.* at 2-3. The name of the cell-site operator was not entered into the record. *See id.*

¹³ *See generally* Original Waiver Request.

¹⁴ Declaration of Michael Schein, Attach. to Original Waiver Request (Schein Decl.). The avoidance action would seek to recover from Commnet the stock of the licensee as an “avoidable transfer” under bankruptcy law.

¹⁵ *See* Original Waiver Request.

¹⁶ *Id.* at 3.

¹⁷ Crossroads License Holding Sub A, Supplement and Update to Waiver Request at 1-2 (filed May 18, 2009) (First Supplement).

¹⁸ Crossroads License Holding Sub A, Form 601 Request for Extension of Time, Narrative Statement in Support of Amended Request for Relief at 2-3 (filed July 8, 2009) (Second Supplement).

¹⁹ *Court Order Confirming Plan* at 1-2; *see also* ULS File No. 0004142962, Exh. 1 (seeking Commission consent of transfer of PCS licenses from Crossroads DIP to Crossroads Trustee).

²⁰ *See* ULS File No. 0004142962. The transaction was conditional in the sense that it was dependent on grant of the waiver request.

²¹ Crossroads Trustee and NTCH, Inc., Application for Review at 3-4 (filed Sept. 6, 2018) (Application for Review); Third Supplement at 3-4.

²² ULS File No. 0004195749.

the extension, NTCH would complete the license buildout, and then Crossroads DIP and NTCH would consummate the assignment to NTCH.²³

11. On May 31, 2012, the Division denied the request for waiver; it found that an extension of time to meet the June 30, 2009 ten-year construction milestone was not warranted and that Crossroads Sub and Commnet had failed to satisfy the Commission's waiver standard.²⁴ The Division stated that it was not persuaded by the claim that there was a cloud of uncertainty surrounding the ownership of the license between February and December 2009. The Division found that the ownership of the license during that period of time was certain and that the decision not to meet the performance requirement "was a voluntary business decision completely within Commnet's control."²⁵ The Division found that, because the licensed spectrum had gone unused through its second construction deadline due to the voluntary business decisions of the licensee, the underlying purpose of the rules would not be furthered by granting the Original Waiver Request.²⁶ Further, the Division found that granting the extension would be contrary to the public interest because it could encourage speculators to obtain licenses in areas where they had no intention of providing service.²⁷

12. On July 2, 2012, the Petitioners filed a Petition for Reconsideration of the *Denial Order*.²⁸ The Petition argued that the Division erred legally and factually when it concluded that Commnet's failure to build out was a voluntary business decision that did not warrant a waiver, and the Petition raised for the first time the argument that a previous licensee had met the ten-year buildout requirement.²⁹

13. On August 7, 2018, the Division denied the petition for reconsideration. The Division found that Petitioners failed to show any material error in the *Denial Order* or to raise any new issues or evidence that would warrant reconsideration.³⁰ The *Reconsideration Denial* concluded that the Petitioners did not present any new information showing either that there was uncertainty surrounding the

²³ Third Supplement at 4.

²⁴ *Commnet Supply, LLC, Crossroads License Holding Sub A, and their successors in interest, Request for Waiver and Extension of PCS Construction Requirements, Request for Renewal of PCS License*, Order, 27 FCC Rcd 5832, 5837-40, paras. 15-20 (WTB-MD 2012) (*Denial Order*); 47 CFR § 24.203(a) (requiring adequate service to the two-thirds of the population in the licensed area within ten years); 47 CFR § 1.925(b)(3) (allowing the Commission to grant a request for a waiver if it is shown that the "underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.").

²⁵ *Denial Order*, 27 FCC Rcd at 5837, para. 15. Specifically, the Division cited the following voluntary decisions: (1) entering into the original agreement with Crossroads Wireless to use Crossroads Sub as security for Crossroads Wireless's debt; (2) accepting the subsequent transfer of Crossroads Sub and the license from Crossroads Wireless; and (3) not constructing a compliant PCS system prior to June 30, 2009 when, by its own admission, it could have completed the construction in a timely manner. *Id.* at 5837, para. 16.

²⁶ *Id.* at 5838-39, para. 18.

²⁷ *Id.* at 5839, para. 19. In November 2012, Petitioners filed a Petition for Reconsideration of the license cancellation and a Request for Extension of Time to Consummate. See ULS File No. 0004195749. To the extent these have yet to be acted upon, they are dismissed as moot, based on the decision of this Order.

²⁸ *Commnet Supply, LLC, Crossroads License Holding Sub A., Petition for Reconsideration at 2* (filed July 2, 2012) (*Petition for Reconsideration*).

²⁹ *Petition for Reconsideration at 2*.

³⁰ *Reconsideration Denial*, 33 FCC Rcd at 8031, para. 15.

ownership of the license or that any alleged uncertainty was beyond Petitioners' control.³¹ The Division again found that *Rainbow Broadcasting* and the *NextWave/Urbancomm* line of cases, relied on by Petitioners, did not support their assertions.³² The Division affirmed that the *ComScape* decision warranted denying Petitioners' requests for relief.³³ The Division also rejected on both procedural and substantive grounds the argument that the ten-year construction requirement had actually been met at the five-year deadline.³⁴

14. On September 6, 2018, NTCH and Crossroads Trustee filed an application for review of the *Reconsideration Denial*.³⁵ Petitioners ask the Commission to: (1) conditionally grant the renewal of the license conditioned on completion of the second buildout obligation in not more than four months, (2) extend the time for consummation of the previously approved assignment of the license to NTCH for four months, and (3) extend the time for completion of the second buildout obligation for four months.³⁶ Petitioners claim that the Division erroneously concluded that Commnet's failure to construct was voluntary, and they continue to assert that there was a "cloud" over the license beginning in March 2009, which precluded Commnet from meeting the June 30, 2009 buildout deadline.³⁷ They also argue that the Division misconstrued or did not address prior precedent.³⁸

III. DISCUSSION

15. We deny the Application for Review. Petitioners have not demonstrated that a waiver or extension of the buildout deadline is appropriate under sections 1.925 and 1.946(e) of the Commission's rules. We uphold the Division's findings and conclude that the Division's basis for denial was consistent with Commission precedent and policy. The Petitioners (and before them, the previous licensees) have not shown there was a "cloud" over the license due to a threatened avoidance action, and even if there were, they have not shown that the cloud was the result of actions outside of the Petitioners' (or previous licensees') control. In any event, even if Petitioners had made these showings, the failure by the previous licensees to take any steps to construct facilities during the five-year period prior to the June 30, 2009

³¹ *Id.* at 8030-31, paras. 13-15.

³² *Id.* at 8031-32, paras. 15-18. *See Federal Communications Commission v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003); *NextWave Personal Communications Inc. and NextWave Power Partners Inc.*, Order, 18 FCC Rcd 3235 (WTB 2003) (*NextWave*); *Urban Comm-North Carolina, Inc.*, Order, 20 FCC Rcd 9993 (WTB-MD 2005); *Urban Comm-North Carolina, Inc.*, Order, 21 FCC Rcd 10824 (WTB-MD 2006) (*Urban Comm*) (collectively, *NextWave/UrbanComm*); *Rainbow Broadcasting Company*, GC Docket No. 95-172, Decision, 13 FCC Rcd 21000 (1998) (*Rainbow Broadcasting*).

³³ *Reconsideration Denial*, 33 FCC Rcd at 8033, para. 16, n.59; *Applications of ComScape Communications*, Order, 26 FCC Rcd 8831 (WTB-MD 2011) (*ComScape*).

³⁴ *Reconsideration Denial*, 33 FCC Rcd at 8032-35, paras. 19-29.

³⁵ *See generally* Application for Review. *See* ULS File Nos. 0003818184, 0003805569; Call Sign WQGH652.

³⁶ Application for Review at 11.

³⁷ *Id.* at 2-3. The Application for Review intimates—seemingly for the first time in the record—that the avoidance action was threatened in March 2009. *See* Application for Review at 3. However, the Schein Declaration is dated April 16, 2009, supporting an April, not March, 2009 date. Schein Decl. The Original Waiver Request also supports an April 2009 date. Original Waiver Request at 3 ("At approximately the same time [as April 9, 2009], Commnet was advised that the Crossroads bankruptcy estate intends to commence an avoidance action . . ."). Nonetheless, we proceed as if March 2009 were, *arguendo*, the date that the avoidance was threatened, as that does not change our analysis. Petitioners did not attempt to preserve on review the argument that the ten-year buildout requirement had been previously met. *See generally* Application for Review.

³⁸ *See* Application for Review at 6-10 (citing *NextWave/UrbanComm*; *Rainbow Broadcasting Company*, 13 FCC Rcd at 21000; *Maritime Communications/Land Mobile, LLC, Debtor-in-Possession et al.*, Order, 32 FCC Rcd 3907 (WTB-MD 2017) (*MCLM Order* or *MCLM*)).

buildout deadline was completely voluntary and demonstrated a lack of diligence.

A. Legal Standards Governing Waiver and Extension Requests

16. An application for review may be filed by those aggrieved by any action taken pursuant to delegated authority.³⁹ Actions taken on delegated authority that warrant review by the Commission include those where there has been “[a]n erroneous finding as to an important or material question or fact”⁴⁰ or “the action taken pursuant delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.”⁴¹

17. To justify a waiver, petitioners must overcome a “high hurdle.”⁴² Under section 1.925, the Commission may waive specific requirements of the rules on its own motion or upon request.⁴³ The Commission may grant a request for waiver if it is shown that: “(i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”⁴⁴ Similarly, under section 1.3 of the Commission’s rules, “any provision of the rules may be waived on its own motion or on petition if good cause therefor is shown.”⁴⁵

18. Section 1.946(e) of the Commission’s rules also allows for an extension of time “if the licensee shows that failure to meet the construction or coverage deadline is due to involuntary loss of site or other causes beyond its control.”⁴⁶ An extension will not be granted, however, “for failure to meet a construction or coverage deadline due to delays caused by a failure to obtain financing, to obtain an antenna site, or to order equipment in a timely manner.”⁴⁷ Notably, the Applicant must show diligence towards construction.⁴⁸ Moreover, an extension will not be granted “for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control or because the licensee intends to assign the authorization.”⁴⁹ And “[t]he Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct.”⁵⁰

³⁹ 47 CFR § 1.115.

⁴⁰ 47 CFR § 1.115(b)(2)(iv).

⁴¹ 47 CFR § 1.115(b)(2)(i).

⁴² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

⁴³ 47 CFR § 1.925(a).

⁴⁴ 47 CFR § 1.925(b)(3)(i)-(ii).

⁴⁵ 47 CFR § 1.3.

⁴⁶ 47 CFR § 1.946(e)(1).

⁴⁷ 47 CFR § 1.946(e)(2).

⁴⁸ *Id.* (“If the licensee orders equipment within 90 days of its initial license grant, a presumption of diligence is established.”); *see also Advance Communication Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 3399, 3414, para. 36 (1995) (finding that lack of significant progress toward construction was due to licensee’s extended inaction and apparent lack of commitment to operating its own system); *Mr. Lee G. Petro*, Letter Order, 25 FCC Rcd 9046, 9050 (WTB-Auctions and Spectrum Access Division 2010) (concluding that applicant’s failure to take active steps at several points to confirm completion of payment constituted inaction that “indicates something well short of due diligence.”).

⁴⁹ 47 CFR § 1.946(e)(3).

⁵⁰ *Id.*

B. Analysis of Petitioners' Arguments

19. Petitioners have argued that waiving their construction requirement would better promote the purposes of the Commission's rules.⁵¹ But enforcing the deadline in this case, far from frustrating the goal of the rule, fulfills its intended purpose and sends an appropriate message to anyone acquiring license rights of the importance of complying with their buildout obligations. The purpose of a construction requirement is to promote the timely and productive use of spectrum, to encourage licensees to provide service to consumers expeditiously, and to promote the deployment of innovative services.⁵² In light of these important public policy goals, the Commission has established rules and policies to deter licensees from attempting to evade their buildout obligations, and has not granted relief where the failure to construct is due to voluntary business decisions or other circumstances within the control of the licensee.

1. Commnet and Predecessors' Inaction Was Voluntary

20. We affirm the Division's findings that Commnet made several voluntary business decisions resulting in its failure to meet the deadline. Specifically, with a ten-year buildout requirement looming, it: (1) apparently failed to take any action to initiate buildout or otherwise protect its asset,⁵³ (2) accepted the transfer of Crossroads Sub and the license from Crossroads Wireless with less than a year before the buildout deadline, and (3) entered into the original agreement with Crossroads Wireless to use Crossroads Sub as security for Crossroads Wireless's debt.⁵⁴ We reject the claim that events outside the prior licensees' control were responsible for the failure to build out. As the Division observed,⁵⁵ Commnet admits that it could have built out, but chose not to.⁵⁶

21. Crossroads Sub and Commnet contend that they could not meet the ten-year buildout deadline based entirely on problems that arose in the final months before the deadline, ignoring the preceding years during which no buildout efforts were made. When a licensee accepts a license, it accepts the license's construction deadline and has the same obligation to meet the deadline whether it has been the licensee the entire time or just for the final few months.⁵⁷ Crossroads Sub and Commnet have never presented evidence that they attempted to build out the license. We therefore agree with and affirm the Division's conclusion that Commnet made a voluntary decision not to construct by the June 30, 2009 deadline.⁵⁸ Instead of building, they filed for waiver relief, with Commnet later voluntarily entering into

⁵¹ See Original Waiver Request at 10-11; Application for Review at 9.

⁵² See 47 U.S.C. § 309(j)(4)(B) (the purpose of performance requirements is to ensure the prompt delivery of service to rural areas, to prevent warehousing of spectrum, and to promote investment in and rapid deployment of new technologies and service).

⁵³ Petitioners respond to these findings, but do not dispute their factual basis. See Application for Review at 4.

⁵⁴ *Denial Order*, 27 FCC Rcd at 5837, para. 16.

⁵⁵ *Id.*

⁵⁶ See Application for Review at 1 ("they cannot reasonably be expected to undertake the costly construction of the station at issue because they have no assurance that they will continue to hold the authorization."). Bankruptcy law offers a protection for Petitioner's concern. See *infra* para. 30.

⁵⁷ See 47 CFR § 1.946(e)(3) ("Extension requests will not be granted for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control or because the licensee intends to assign the authorization. The Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct."). See, e.g., *Skybridge Spectrum Foundation*, Order, 33 FCC Rcd 8138, 8148, paras. 21-22 (WTB-MD 2018) (not granting an extension of the construction requirement licensee acquired via an involuntary transfer and failed to construct, despite claiming circumstances beyond its control, such as litigation).

⁵⁸ *Denial Order*, 27 FCC Rcd at 5837, para. 16.

an agreement with the bankruptcy estate to allow the unconstructed license to be sold along with Crossroads Wireless's assets.⁵⁹ A waiver may be justified if a licensee "engaged in diligent efforts to acquire and construct . . . licenses" prior to the last moments before a construction deadline.⁶⁰ Crossroads Sub and Commnet, however, did not do so at any point during the entire period they held the license. And a presumption of diligence is established "if the licensee orders equipment within 90 days of its initial license grant."⁶¹ There is no evidence of even this minimal effort here, however.

22. The lack of diligence exhibited by the licensees also shows that no extension under section 1.946(e) is warranted.⁶² Under section 1.946(e)(3), any new entity taking control of a license voluntarily assumes the duty to take whatever steps are necessary to meet the buildout obligations originally held by its predecessor(s) in the remaining period of the license term.⁶³ As discussed in the *Reconsideration Denial*, the original licensee of the market, Chariton, successfully met, and even exceeded, the interim five-year construction requirement in 2004.⁶⁴ But there is no indication in the record that any further build was made by any of the licensees to satisfy the final construction benchmark for Call Sign WQGH652 in the remaining five years of the license term. In fact, the licensees actually allowed the service coverage that had previously existed to lapse. As Petitioners are not excused by any lack of diligence by prior license holders, we therefore conclude that NTCH should not be granted an extension to complete construction that prior licensees failed to accomplish.⁶⁵

23. Moreover, Petitioners do not contest, and we affirm, the Division's conclusion that Petitioners are barred from obtaining an extension under section 1.946(e)(3) to the extent they justified their requested relief on receipt of the license through "a transfer of control or because [they] intend[ed] to assign the authorization."⁶⁶ An extension cannot be justified by repeated transfers or assignments of

⁵⁹ *Id.* at 5838, para. 17.

⁶⁰ *ComScape*, 26 FCC Rcd at 8838, para. 18; *see also Trustee in Bankruptcy for Magnacom Wireless, LLC and Telecommunications Wrapup Group LLC*, Order, 17 FCC Rcd 9535, 9538, para. 8 (WTB-Commercial Wireless Division 2002) ("[A]lthough TWU submitted its extension request to the Commission only five months before the expiration of the five-year construction period, the record indicates that TWU has been engaged in diligent efforts to acquire and build out the BTAs for over two and a half years."); *T-Mobile License, LLC; Requests for Extension of Time, or in the alternative, Limited Waiver of Substantial Service Requirements for 16 Local Multipoint Distribution Service Licenses*, Memorandum Opinion and Order, 27 FCC Rcd 12287, 12291, paras. 12-13 (WTB 2012) (denying T-Mobile an extension under section 1.946 and a waiver request in part because it "made no attempt to commence construction of its LMDS licenses . . ."); *Emergency Application for Review and Request for Stay of Globalstar*, Memorandum Opinion and Order, 19 FCC Rcd 11548, 11551-54, paras. 7-12 (2004) (finding a lack of diligence to construct is grounds for license revocation in the context of satellite construction).

⁶¹ 47 CFR § 1.946(e)(2).

⁶² *See, e.g., Applications of Montgomery County Media et al.*, MM Docket No. 85-331, Memorandum Opinion and Order, 8 FCC Rcd 2763, 2765, para. 12 (1993) (holding that "an applicant must show that it acted promptly after it discovered, or should have discovered, the potentially disqualifying deficiency . . . [A]n applicant that sits idly by, either doing nothing or pursuing a course of action that is not likely to resolve the problem expeditiously, lacks diligence."); *Cuban-American Limited, et al.*, MM Docket No. 85-27, Memorandum Opinion and Order, 5 FCC Rcd 3781, 3782, paras. 10-12 (1990) (applicant that sought after the ALJ's deadline to amend to a new site, rather than reducing its antenna height upon being advised by its engineer that the FAA would not approve a tower that tall, lacked due diligence).

⁶³ *See* 47 CFR § 1.946(e)(3) ("[e]xtension requests will not be granted for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control . . .").

⁶⁴ *Reconsideration Denial*, 33 FCC Rcd at 8033 para. 23.

⁶⁵ *Denial Order*, 27 FCC Rcd at 5838, para. 17.

⁶⁶ *Id.* at 5838, para. 17; 47 CFR § 1.946(e).

the largely undeveloped license to other parties.⁶⁷

2. The Alleged Fear of an Avoidance Action Is Not A Sufficient Justification for Granting a Waiver or Extension

24. After reviewing the history of failed opportunities and business decisions not to construct by Petitioners' predecessors, the Division denied the waiver request,⁶⁸ then reaffirmed the denial on reconsideration.⁶⁹ Applicants' primary argument for why they should be excused for failure to meet the deployment deadline—the alleged fear of an avoidance action—fails on multiple grounds.

25. *First*, the argument was raised in April 2009,⁷⁰ just over two months before the deadline, when nothing had been done to meet the requirement during the time when Crossroads Wireless (2007-2008) and then Commnet (since at least November 19, 2008) controlled the license.⁷¹ Petitioners argue that an extension is justified because, as of March 2009, “continued ownership of the license was in serious doubt.”⁷² But this argument addresses only the final months of the license term and does not absolve the Petitioners and their predecessors of their inaction in the several years leading up to the final construction deadline.⁷³ The ownership of the license was certain when the license was transferred from Crossroads Wireless to Crossroads Sub and when Commnet decided voluntarily to accept an equity interest in Crossroads Sub as security.⁷⁴ Through this voluntary action, Commnet, along with the licensee, Crossroads Sub, assumed the risk of meeting the June 30, 2009 construction deadline.

26. *Second*, there is no evidence in the record to support the existence of a valid avoidance action. A bankruptcy trustee may bring avoidance actions under several different provisions of title 11 of the United States Code, including sections 544, 545, 547, 548, or 553. The Petitioners have not identified the statutory basis for the allegedly orally threatened avoidance action, but they have suggested that the transfer of stock in Crossroads Sub to Commnet may have been avoidable as a preferential transfer.⁷⁵ A

⁶⁷ *Denial Order*, 27 FCC Rcd at 5838, para. 17 (noting that section 1.946(e)(3) explicitly precludes extensions for failure to construct due to issues relating to a transfer of a license as is the case here); 47 CFR § 1.946(e)(3) (“Extension requests will not be granted for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control or because the licensee intends to assign the authorization. The Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct.”).

⁶⁸ *Denial Order*, 27 FCC Rcd at 5840, para. 21.

⁶⁹ *Reconsideration Denial*, 33 FCC Rcd at 8035, paras. 30-31.

⁷⁰ In a declaration dated April 16, 2009, counsel for Commnet attested to the oral conveyance of a possible avoidance action. Schein Decl. The Original Waiver Request attests that the oral conveyance occurred approximately around April 9, 2009. *See* Original Waiver Request at 2-3.

⁷¹ ULS File No. 0003652711.

⁷² Application for Review at 3.

⁷³ Construction requirements are not extended due to transfers of control. *See* 47 CFR § 1.946(e)(3) (disallowing transfers of control to be a justification for extensions to the construction deadline and stating that “[t]he Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct.”).

⁷⁴ *Denial Order*, 27 FCC Rcd at 5837, para. 15.

⁷⁵ *See* Petition for Reconsideration at 7 (“The obvious concern is that a debtor is transferring assets to favored creditors in such a way that the rights of other creditors to a fair share of the proceeds of the asset is being defeated.”); Third Supplement at 2-3 (“[T]he question immediately arose as to whether the November transfer of this asset to Commnet was avoidable as a preference or by other transfer avoidance provisions applicable in bankruptcy cases. One possible argument for avoidance was that the Station was recoverable for the benefit of all CWT’s creditors, rather than Commnet alone.”); Application for Review at 2 (“Under Chapter 5 of the Bankruptcy (continued....)”).

transfer of an asset to a creditor to satisfy an antecedent debt within 90 days of the filing of a bankruptcy is subject to avoidance as a “preference” under Section 547 of the Bankruptcy Code.⁷⁶ The problem for the Petitioners is that the transfer of the stock in Crossroads Sub to Commnet appears to have occurred 93 days prior to the bankruptcy filing.⁷⁷ Unless Commnet was an insider, which Petitioners have not alleged, section 547 does not apply.⁷⁸

27. Even assuming under some legal theory that section 547 could apply, when a debtor makes a transfer to a secured creditor, the transfer is generally not avoidable as a preference because the secured party does not receive more than it would have in a hypothetical chapter 7 liquidation.⁷⁹ If the creditor’s security interest is not perfected, however, the transfer may be subject to avoidance as a preference, because the creditor would be receiving more than it would under a hypothetical chapter 7 liquidation.⁸⁰ Thus, perfection of a security interest by a creditor in a debtor’s asset more than 90 days before a bankruptcy filing will typically protect that asset from an avoidance action even if the asset itself is transferred within those 90 days, and is within the control of the creditor.⁸¹ And we note that if the Petitioners believe that some other legal basis for an avoidance action exists, they have not articulated it nor provided any arguments or evidence for the Commission to consider such a basis.

28. *Third*, as Petitioners acknowledge, if Commnet had perfected its security interest in Crossroads Sub, which it acquired in August of 2008, it would hold the license free and clear from claims arising from the bankruptcy proceeding, and, as a result, it would have been protected against a threatened avoidance action.⁸² Petitioners did not provide any evidence as to why Commnet apparently failed to take all the necessary steps within its control to perfect its security interest or why its apparent failure to do so

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Code, certain transfers of assets shortly before the initiation of a bankruptcy proceeding are ‘avoidable’ as preferring one creditor over the others.”).

⁷⁶ 11 U.S.C. § 547; *In re Roblin Indus., Inc.*, 78 F.3d 30, 34 (2d Cir. 1996) (“To be recoverable as a preferential transfer, a payment must satisfy all of the requirements of 11 U.S.C. § 547(b); it must have been: 1. to or for the benefit of a creditor; 2. for or on account of an antecedent debt owed by the debtor before such transfer was made; 3. made while the debtor was insolvent; 4. on or within 90 days before the date of filing of the petition (providing that the payee is not an insider); and 5. enable the benefited creditor to receive more than such creditor would have received had the case been a chapter 7 liquidation and the creditor not received the transfer.”).

⁷⁷ The “transfer of all of the equity” in Crossroads Sub to Commnet was “consummated on November 19, 2008,” and Crossroads Wireless filed its bankruptcy petition on February 20, 2009. Original Waiver Request at 2.

⁷⁸ See 11 U.S.C. § 547(b).

⁷⁹ See *In re LCO Enter.*, 12 F.3d 938, 941 (9th Cir. 1993) (“If a creditor is fully secured, a prepetition transfer to him is not preferential because the secured creditor is entitled to 100% of his claim.”); *Travelers Ins. Co. v. Cambridge Meridian Group, Inc. (In re Erin Food Services)*, 980 F.2d 792, 803 (1st Cir.1992) (“Transfers to a fully-secured creditor . . . are not avoidable as preferences, since the secured claim would be satisfied in full in a chapter 7 liquidation.”).

⁸⁰ See *In re L & T Steel Fabricators*, 102 B.R. 511, 518 (Bankr. M.D. La.1989) (“Very simply, a creditor who is a transferee of property of a debtor on account of a security interest that is not perfected as to third parties in accordance with applicable state law (if all other criteria of § 547(b) are met), receives more than that creditor would receive at liquidation without the transfer, since the Chapter 7 trustee, after rendering that creditor’s claim unsecured by means of his § 544 avoiding powers, would distribute the property among all unsecured creditors of the estate (after payment of administrative expenses).”).

⁸¹ See, e.g., *In re Millivision, Inc.*, 474 F.3d 4, 6 (1st Cir. 2007) (“[T]he bankruptcy court aptly noted that appellants could have avoided their predicament by the simple expedient of recording (thus perfecting) their security interest in the [debtor’s] assets.”).

⁸² See Application for Review at 5 (noting that Commnet’s perfection of the security interest in the asset “would have given its security interest a preferred status.”).

was outside of its control.⁸³ Petitioners acknowledge that Commnet *believed* it had perfected its interest, but did not explain why it was apparently unsuccessful in doing so. Specifically, Petitioners stated that: “it appears that Commnet attempted to perfect this security interest For reasons which do not appear on the record, the perfection of the security interest was later at issue, but this is obviously the opposite of what Commnet would have wanted, not a voluntary act.”⁸⁴ Regardless of what Commnet “would have wanted,” the record lacks evidence that Commnet indeed perfected its security interest or took the necessary steps to do so. Therefore, we cannot conclude that any “cloud” placed on the license from Commnet’s apparent failure to perfect its security interest was outside of Commnet’s control.⁸⁵

29. An extension is also not appropriate to protect the Petitioners from the outcome of a voluntary investment choice. We reject Commnet’s argument that “[n]othing about the acquisition could have been expected to place the license in jeopardy.”⁸⁶ The underlying purpose of taking a security interest in Crossroads Sub was to protect Commnet’s investment in Crossroads Wireless from a possible, foreseeable loss. Commnet took the security interest in and later acquired Crossroads Sub because Crossroads Wireless could not pay Commnet for the hundreds of thousands of dollars of equipment Commnet sold Crossroads Wireless.⁸⁷

30. *Finally*, Crossroads DIP was a chapter 11 debtor-in-possession of the Crossroads Wireless bankruptcy estate.⁸⁸ It therefore had the responsibility to maximize the value of its estate for the benefit of its creditors.⁸⁹ If Crossroads DIP truly believed it had a valid claim to the license, it had an obligation to its creditors to preserve the asset by ensuring that the construction was completed.⁹⁰ Petitioners have presented no evidence as to why such an agreement was not reached, while other agreements between Commnet and Crossroads DIP, such as Commnet’s later agreement to transfer the license to Crossroads DIP so it could be further transferred to the liquidating trust, were made. The failure of Commnet and Crossroads DIP to reach an agreement to complete construction by June 30, 2009 was a voluntary business decision of the parties.

⁸³ *Id.* at 4-5, 10.

⁸⁴ *Id.* at 5 (emphasis in original).

⁸⁵ See 47 CFR § 1.946(e)(1).

⁸⁶ Application for Review at 5.

⁸⁷ Third Supplement at 2.

⁸⁸ With respect to the relationship between Crossroads Wireless and Crossroads DIP relative to the License’s buildout requirements, it is “sensible to view the debtor-in-possession as the same ‘entity’ [that] existed before the filing of the bankruptcy petition.” *N.L.R.B. v Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

⁸⁹ “A debtor-in-possession owes a fiduciary duty to maximize the value of the estate to all its creditors.” *In re Big Rivers Elec. Corp.*, 233 B.R. 739, 751 (W.D. Ky. 1998) (citing *Four B. Corp. v. Food Barn Stores Inc. (In re Food Barn Stores)*, 107 F.3d 558, 564–65 (8th Cir. 1997); *Myers v. Martin (In re Martin)*, 91 F.3d 389, 394 (3rd Cir. 1996); *Metropolitan Airports Comm’n v. Northwest Airlines Inc. (In re Midway Airlines Inc.)*, 6 F.3d 492, 494 (7th Cir. 1993); *In re Wintex*, 158 B.R. 540, 543 (D. Mass. 1992); *Cello Bag Co. v. Champion Int’l Corp. (In re Atlanta Packaging Prod. Inc.)*, 99 B.R. 124, 131 (Bankr. N.D.Ga. 1988)).

⁹⁰ Additionally, had Commnet completed construction by the June 2009 deadline and the bankruptcy court subsequently determined that the transfer of stock of Crossroads Sub was avoidable, Commnet may have had an administrative expense claim pursuant to 11 U.S.C § 503 against the Crossroads DIP’s bankruptcy estate for the costs associated with construction after the bankruptcy filing, during the months when a supposed cloud existed, to the extent that such construction provided a benefit to the estate and preserved estate assets. Petitioners have not addressed why an administrative expense claim would be inadequate to protect Commnet’s interests, but have merely concluded that had Commnet completed construction, it would have lost its investment. See Application for Review at 3, 6.

3. Denial of the Extension Is Consistent with Commission Precedent and Policy

31. Petitioners on review cite three precedents that they claim support their case. We disagree. The *NextWave/Urbancomm*, *Rainbow Broadcasting*, and *MCLM* cases are inapposite, as the Commission's grant of additional time for construction in each of those cases was predicated on a real and present obstacle to buildout that, in combination with other factors, led the Commission to conclude that the additional time was warranted. None of those cases apply to the facts of this case. The multiple failures of the various licensees to meet their obligations cannot be excused by last-minute efforts to allege uncertainty or to transfer the license yet again to another party, including after the deadline has passed.

32. In the *NextWave/UrbanComm* cases, bankruptcy had disrupted required payments on the license.⁹¹ The Commission had maintained during the resulting course of litigation that the licenses at issue had been cancelled as a result.⁹² Because the Commission had determined that the license was cancelled, NextWave and Urban Comm were effectively precluded from constructing and operating their stations until that issue was ultimately resolved in the licensees' favor through litigation.⁹³ Here, Petitioners and their predecessors chose not to construct under a license that remained in place due solely to an internecine dispute. That delay was in no way caused by the Commission's rules or actions.

33. *Rainbow Broadcasting* is also inapposite. As the Division observed, Rainbow Broadcasting faced outside litigation, Commission inquiries, and Mass Media Bureau actions that consumed the entire buildout period and more.⁹⁴ Unlike the ten-year buildout term for Petitioners, Rainbow had only 24 months to construct. From the outset, there were four years of litigation that prevented Rainbow from constructing.⁹⁵ The Commission's rules and staff actions also contributed to delays in construction.⁹⁶ Yet despite the events outside of Rainbow's control preventing construction, Rainbow still undertook significant pre-construction activities and promptly completed construction once it could do so.⁹⁷ Here, the outside factors that Petitioners point to did not occur until the final months of a ten-year buildout period, and the underlying licensees admitted that they made a purely business decision not to build,⁹⁸ despite their obligations to do so under bankruptcy law.⁹⁹

⁹¹ See generally *NextWave/UrbanComm*.

⁹² *NextWave*, 18 FCC Rcd at 3235-36, para. 3 n.1; *Urban Comm*, 21 FCC Rcd at 10826-27, paras. 6-8.

⁹³ See *NextWave*, 18 FCC Rcd at 3237-39, paras. 6-11 (observing, for example, "it would be inequitable to hold NextWave to the original License build-out deadlines, given the Commission's assertion of license cancellation" which in itself would have precluded NextWave from building out); *UrbanComm*, 21 FCC Rcd at 10827, para. 7 ("Applying a similar analysis [as *NextWave*] here, we find that it is equitable to grant tolling of the ten-year construction deadline . . .").

⁹⁴ *Denial Order*, 27 FCC Rcd at 5839-40, para. 20.

⁹⁵ *Rainbow Broadcasting*, 13 FCC Rcd at 21022, para. 45 (noting litigation was occurring as the construction permit was issued and that during the litigation the "Commission itself cast a cloud over the validity of the grant to Rainbow by seeking remand of the proceeding from the Court of Appeals").

⁹⁶ *Denial Order*, 27 FCC Rcd at 5841, para. 20. Because of the litigation at the outset of the license, a "Bureau staff member initially resolved this apparent tension between the 24-month rule and the rule limiting extensions to six months by advising Rainbow in 1988 that, once the litigation was over, it would get 24 months to construct, to be provided in six-month extension increments." *Rainbow Broadcasting*, 13 FCC Rcd at 21022, para. 47. This would have required Rainbow to file extensions without ever having the 24-month period deemed adequate for construction. *Id.* The Commission also found that the "hiatus of nearly two years while Rainbow's sixth extension request was pending was not Rainbow's fault . . . it was the fault of the Bureau, . . ." *Id.* at 21023, para. 49.

⁹⁷ *Rainbow Broadcasting*, 13 FCC Rcd 21023-24, paras. 48-49.

⁹⁸ Application For Review at 3 ("Under these circumstances, no sane business case would have justified Commnet to proceed to spend hundreds of thousands of dollars to build a cellular network and initiate service to the public (continued....)");

34. In *MCLM*, found circumstances beyond the licensee's control in that the Commission had placed the license into question by initiating a hearing on the licensee's character qualifications, and the licensee was bound for a period of time by a bankruptcy plan that did not provide for expenditures for buildout.¹⁰⁰ In contrast, the petitioning parties and their predecessors here were not prevented from building out by any action taken in litigation—their arguments are all predicated on anticipated litigation that did not materialize—and they have failed to cite any other factors that might help justify the requested waiver. The mere threat of litigation that might affect a license is insufficient to justify grant of a waiver.¹⁰¹

35. We also conclude that *ComScape* supports a denial.¹⁰² In *ComScape*, the Division rejected the licensee's contention that difficulties leading to its failure to meet its final construction requirement—internecine corporate litigation as well as a pending bankruptcy action—were circumstances beyond its control that justified an extension of a construction requirement.¹⁰³ The Division found that *ComScape*'s internal disagreements and its decision to enter into a voluntary bankruptcy were both wholly within the control of the licensee.¹⁰⁴ We disagree with Petitioners' argument that the *ComScape* precedent does not apply to the facts here because Commnet was not the "instigator" of the bankruptcy proceeding.¹⁰⁵ We fail to see how this fact makes *ComScape* inapplicable.¹⁰⁶ Even if Commnet did not bring about the bankruptcy proceeding, as Petitioners argue, Commnet nevertheless made voluntary business decisions that put it in difficult circumstances: it voluntarily chose to acquire the largely unconstructed license shortly before final construction requirements were due; it chose not to reinstate service that had previously existed in the market; and it chose not to construct before the deadline and keep the license from terminating despite its admitted ability to do so. Moreover, even assuming there actually were a cloud over the license posed by the threatened avoidance action, Commnet failed to take action that would have protected it from claims arising from the bankruptcy. As was the case in *ComScape*, the circumstances at issue were within Commnet's (and thus the Petitioners') control.

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while its continued ownership of the license was in serious doubt."); *see also Reconsideration Denial*, 33 FCC Rcd at 8031, para. 16.

⁹⁹ *See* para. 30, *supra*.

¹⁰⁰ *MCLM Order*, 32 FCC Rcd at 3913-16, paras. 15-20 (noting the "totality of the particular facts of this case" including, for example, "the prolonged hearing," and that "the [bankruptcy] Plan did not provide for . . . expenditures" to pay for the licensee to build out).

¹⁰¹ Indeed, even pending litigation that might affect the license does not necessarily warrant grant of a waiver. *Cf.* 47 U.S.C. § 405(a); 47 CFR § 1.106(n).

¹⁰² *Denial Order*, 27 FCC Rcd at 5837, para. 16.

¹⁰³ *ComScape*, 26 FCC Rcd at 8835, para. 12.

¹⁰⁴ *Id.*

¹⁰⁵ Application for Review at 7.

¹⁰⁶ Petitioners conflate the Division's internecine litigation grounds for denying *ComScape*'s request for a construction extension with its voluntary-bankruptcy grounds of denial. Application for Review at 7. However, these were independent reasons for rejecting *ComScape*'s request. *See ComScape*, 26 FCC Rcd at 8835, para. 12 ("We reject the suggestion that internal corporate litigation justifies extension of a construction requirement. *ComScape*'s inability to find agreement within itself and subsequent litigation to determine corporate control is not a circumstance beyond the licensee's control, rather it is a matter wholly within the licensee's purview" and "We *also* reject the suggestion that entering into voluntary bankruptcy warrants an extension of the second construction deadline.") (emphasis added).

IV. ORDERING CLAUSES

36. ACCORDINGLY, **IT IS ORDERED**, pursuant to sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 USC §§ 154(i) and 155(c), and section 1.115 of the Commission's rules, 47 CFR § 1.115, that the Application for Review filed by NTCH, Inc., and Crossroads Wireless Liquidating Trustee on September 6, 2018, **IS DENIED**.

37. IT IS FURTHER **ORDERED** that, pursuant to sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 USC §§ 154(i) and 155(c), and section 1.115 of the Commission's rules, 47 CFR § 1.115, the NTCH, Inc. Petition for Reconsideration of Dismissal of Application, File No. 0004195749, filed November 16, 2012, and the NTCH, Inc. Request for Extension of Time to Consummate, File No. 0004195749, filed November 21, 2012, **ARE DISMISSED** as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary